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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 594

TAKOMA PARK BANK, INC.,

Petitioner,

vs.

LEROY ABBOTT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

LEONARD J. GANSE,
JOHN W. CRAGUN,
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Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

TAKOMA PARK BANK, INC.,

Petitioner,

vs.

LEROY ABBOTT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Takoma Park Bank, Inc., by its attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Maryland entered in the above cause on April 9, 1941.

Opinion Below.

The trial court rendered no written opinion on the merits.

The opinion of the Court of Appeals of the State of Maryland (R. 97) is not yet officially reported, but appears in 19 At. (2d) 169.

Jurisdiction.

The judgment of the Court of Appeals of the State of Maryland was entered April 9, 1941 (R. 110, 123). A motion for re-argument was timely filed, and was entertained (R. 110). It was overruled June 10, 1941 (R. 122).

Jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended.

The Federal right, privilege or immunity claimed is based on Executive Order No. 6260, promulgated August 28, 1933 (12 U. S. C. §95, note), issued by the President of the United States by virtue of the authority of the Act of October 6, 1917, as amended by section 2 of the Act of March 9, 1933, c. 1, 48 Stat. 1 (12 U. S. C. § 95a).

The Federal question was specially set up and claimed in petitioner's (defendant's) second plea to the declaration of respondent (R. 8-10). This plea was challenged by a general demurrer of respondent (R. 14), which was sustained (R. 13). The question was again raised by a requested instruction to the jury (defendant's "C" prayer), (R. 58), which was rejected (R. 61). The Federal question was preserved in the Court of Appeals of Maryland,[1] where it was recognized by that court (R. 102-3), and was passed upon in part (see below).

The Federal question involves the right of a plaintiff (respondent) to recover for the loss of Gold Certificates assertedly kept by him in a safe-deposit box of a bank (petitioner), in contravention of the Gold Hoarding Act and Executive Order. Petitioner has contended throughout this proceeding that respondent has no property right in the Gold Certificates, either legal or equitable, which a court

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[1] No assignment of errors appears in the record. Under Maryland practice the equivalent of an assignment of errors is carried in the brief on appeal, pursuant to Rule 39 of the Rules of the Court of Appeals of Maryland.

may recognize consistent with Executive Order No. 6260, *supra.*

The questions here presented have not heretofore been passed upon by this Court. Petitioner's contentions are not foreclosed by the statute and Executive Order, but to the contrary, are supported by the language thereof. Counsel have found no opinion which supports the decision below.[2] The Federal questions are therefore substantial. *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105; *Milheim* v. *Moffat Tunnel Dist.,* 262 U. S. 710, 716-717; *Louisville & N. R. Co.* v. *Melton,* 218 U. S. 36, 49.

In the face of petitioner's contentions, the court below announced five reasons why respondent could recover.[3]

Three of the points of decision directly concern the Federal question—they involve a construction of the Gold Hoarding Act and Executive Order, and the policy to be followed in the application thereof. These points are:

(a) That it was necessary for petitioner, in denying the right of respondent to recover for Gold Certificates, affirmatively to allege and prove that respondent did not have a "license" to possess or own them.[4]

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[2] At least one opinion, that of the highest court of the State of Kansas, in *Schmidt* v. *Twin City State Bank,* 151 Kan. 667, 100 P. (2d) 652, is directly contrary to the judgment below.

[3] A sixth ground of decision is hinted at rather than ruled. In attempting to distinguish *Schmidt* v. *Twin City State Bank,* 151 Kan. 667, 100 P. (2d) 652, it is said merely that "in that case, at the conclusion of plaintiff's case, the defendant filed a motion to strike from the record all evidence concerning gold coins" (R. 103). But petitioner twice raised the Federal question—once by its second plea; and again at the close of the evidence by its "C" prayer. If the language above quoted be taken as a ground of decision in the court below, nevertheless this Court has held that failure to move to strike out evidence is not fatal to its jurisdiction, where a constitutional question was otherwise raised and preserved. *Brown* v. *Mississippi,* 297 U. S. 278, 286-287. Compare, *New York Central R. Co.* v. *New York & Pa. Co.,* 271 U. S. 124, 126-127.

[4] Thus, the question is, whether as a matter of Federal policy the holder of Gold Certificates must show the license required by Section 5 of Execu-

(b) That it was necessary for petitioner affirmatively to show that respondent had held and retained possession of the Gold Certificates with intent to violate the Gold Hoarding Act and Executive Order.[5]

(c) That petitioner, as bailee conducting a safe-deposit business, was estopped to deny the right, title and interest of respondent in the Gold Certificates.[6]

One, and perhaps two, of the points purport to rest the decision on non-Federal grounds based upon Maryland pleading and practice.[7] These points were (1) that petitioner's second plea to the declaration was insufficient as not answering the whole declaration, because there was no defense set up therein to the loss of $500 in currency (not

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tive Order No. 6260, before he may "retain any interest, legal or equitable," in them; or whether one contesting his right to hold them must establish the absence of any license. Cf. *Nortz* v. *United States*, 294 U. S. 317, 329 (where this Court said that the holder of Gold Certificates did not bring himself within any of the stated exceptions of the Gold Hoarding Act and Executive Order, and did not allege that he held a federal license). The solution of this question, and the consequent burden of proof, does not depend on state policy, but on the policy to be found in the Gold Hoarding Act and Executive Order. *Hill* v. *Smith*, 260 U. S. 592, 594.

[5] It is a Federal question whether the Gold Hoarding Act and Executive Order require such a showing of intent in a civil action of this kind; or whether the question of intent is applicable only to the penal section of the Act and Executive Order, where alone intent is mentioned. Act of October 6, 1917, as amended by Act of March 9, 1933, c. 1, § 2, 48 Stat. 1 (12 U. S. C. § 95a); Executive Order No. 6260, August 28, 1933 (12 U. S. C. § 95 note).

[6] The effect of this ruling is to permit one to recover for that as to which the Executive Order provides he shall not "retain any interest, legal or equitable." The decision below holds in substance that the question of gold hoarding may not be raised as between bailor and bailee in any case. This presents a Federal question. *Grand Rapids & I. R. Co.* v. *Osborn*, 193 U. S. 17, 27-28. The state rule of estoppel must yield to the policy of the Federal statute. *Anderson* v. *Carkins*, 135 U. S. 483, 485-486.

[7] As shown above, the Federal question was raised not once, but twice. If either occasion properly raised the question, then the jurisdiction of this Court is beyond successful challenge. The two rulings here referred to, however, purport to strike out, consecutively, petitioner's raising of the question.

Gold Certificates); (2) that petitioner's "C" prayer for instructions was properly rejected, because based on the second plea to which a demurrer had been sustained.

But it is petitioner's position that these grounds of the decision below do not rest on a fair or substantial basis, and in such circumstances are not binding or conclusive on this Court. *Ward* v. *Love County,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Rogers* v. *Alabama,* 192 U. S. 226, 230-231; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282-283; *New York Central R. Co.* v. *New York & Pa. Co.,* 271 U. S. 124, 126-127; *Patterson* v. *Alabama,* 294 U. S. 600, 602-607. As was said by Mr. Justice Holmes in *Davis* v. *Wechsler, supra:*

> "We are of opinion that the judgment must be reversed. Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. *Ward* v. *Love County,* 253 U. S. 17, 22. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U. S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way. * * *"

The fact that these two grounds were not fairly taken by the court below will be apparent from the following:

1. (a) Petitioner's second plea by its terms limited its denial to the right of respondent to recover damages for

the alleged loss of Gold Certificates; and did not, as the court below said, purport to assert a defense to anything but the claim for Gold Certificates.[8]

(b) In support of its decision that the second plea was defective, the court below cites *Mitchell* v. *Sellman*, 5 Md. 376. To the contrary, that case is specific authority for the sufficiency of petitioner's second plea.[9]

(c) But even if this plea were defective in form in failing to announce by words that it was a partial defense, nevertheless, under the policy of Maryland, plainly announced in its statutes (enacted subsequent to *Mitchell* v. *Sellman*, *supra*), "any plea necessary to form a legal defense shall be

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[8] The plea expressly reads (R. 8-10):

"Second Plea.

"For that Plaintiff seeks to recover damages, and interest and profits, for an alleged failure and refusal of the defendant to produce and restore to plaintiff and for an alleged loss of, *among other things*, fifty One Thousand Dollar gold certificates, of the United States of America, but in which said plaintiff had no interest, legal or equitable. For that the said plaintiff held said gold certificates of the United States in violation of Section 5(b) of the Act of Congress of October 6, 1917, as amended by Section 2 of the Act of Congress of March 9, 1933, entitled: 'An Act to provide relief in the existing national emergency in banking and for other purposes' (48 Stat. 1), [quoting Act and Executive Order].

"And wherefore plaintiff, having no interest, legal or equitable, in or to the alleged fifty (50) One Thousand Dollar gold certificates of the United States, is not legally entitled to maintain this action to recover damages, interest and profits for the alleged loss *thereof*." (Italics added.)

[9] In *Mitchell* v. *Sellman* (*supra*), where an attack was made by an appellee on the sufficiency of a plea as to matters of substance and form, the court said (p. 384):

"• • • 'Every plea must answer the whole declaration or count; or rather all that it assumes, in the introductory part, to answer, and no more. If a plea begin as an answer to part, and is, in truth, but an answer to part; as if a defendant, in trespass for taking two sheep, plead that the plaintiff ought not to have his action as to one, because he took that one doing damage on his close, it is sufficient as far as it extends'. 1 Chitty's Pl., 523. The objections as to want of defense and prayer for judgment do not apply to this plea. • • •"

sufficient, without reference to mere form";[10] and likewise, it was not necessary "to state any formal commencement or conclusion to any • • • plea".[11] So clear is this policy of Maryland, that the Code further provides that "No special demurrer shall be allowed in any civil case".[12] Nor can a general demurrer "be allowed for a mere informal statement of a • • • defense; provided, such statement is sufficient in substance."[13] These statutory pronouncements of policy as to pleading were ignored by the court below in its attempt to place the case beyond reach of this Court.

2. Defendant's "C" prayer (R. 58) for instructions to the jury again raised the question of the right of respondent to recover for alleged loss of Gold Certificates which he held in violation of the Gold Hoarding Act and Executive Order.[14] The court below said that "The demurrer to the second plea having been sustained, the defendant's C. prayer based on the second plea was properly rejected"[15] (R. 104).

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[10] Sec. 3, Art. 75, Ann. Code, Md. (Flack, 1939). *Spencer* v. *Baltimore & O. R. Co.*, 126 Md. 194, 202; *Mitchell* v. *Wedderburn*, 68 Md. 139, 142-144. Compare *Lapp* v. *Stanton*, 116 Md. 197, 199.

[11] Sec. 5, Art. 75, Ann. Code, Md. (Flack, 1939). Cf. *Cumberland &c. R. Co.* v. *Slack*, 45 Md. 161, 178-179.

[12] Sec. 7, Art. 75, Ann. Code, Md. (Flack, 1939). Cf. *Mitchell* v. *Wedderburn*, 68 Md. 139, 143; *Gott* v. *State*, 44 Md. 319, 336-337.

[13] Sec. 8, Art. 75, Ann. Code, Md. (Flack, 1939). Cf. *State* v. *German Savings Bank*, 103 Md. 196, 202-204.

[14] This prayer was a request for a direction by the court that plaintiff could not recover for Gold Certificates held despite the prohibitions of the Federal law.

[15] This statement of the court misconstrues the prayer. The prayer referred to the second plea of defendant (petitioner) only as to "the *state of facts* alleged in the defendant's second plea". The prayer was not "based on the second plea", as said by the Court of Appeals (R. 104), nor did it refer to said plea other than for the purpose of identifying facts which had been proved in the trial.

The holding of the court below is erroneous. If it was meant that this prayer was properly rejected because not based on a plea in the record, then the ruling was wrong because the defense of gold hoarding was available to petitioner under the General-Issue plea [16] on which the case was tried. The prayer was based on the uncontradicted testimony of respondent that he had held Gold Certificates in defiance of the Gold Hoarding Act and Executive Order. Accordingly, as to these a prayer for direction was proper. On the other hand, if the ruling be intended to mean that the Gold Hoarding Act and Executive Order were not available as a defense, because the decision of the trial court on demurrer to the second plea had become the law of the case on gold hoarding, then the Federal question is squarely presented.

Questions Presented.

1. Whether one who held Gold Certificates after thirty days from August 28, 1933, retained any interest, legal or equitable, therein, so that he could maintain an action for them.

2. Whether one who held Gold Certificates after thirty days from August 28, 1933, must establish that he had a license to possess them, in order to bring himself within the exception to the Gold Hoarding laws.

3. Whether the policy of the Gold Hoarding laws imposes upon one defending a civil action, brought by a holder of Gold Certificates, the burden of showing that the holder intended to violate the statute.

4. Whether a holding that a bailee of Gold Certificates is estopped to deny that the bailor had any interest, legal

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[16] Section 28, (58), Art. 75, Ann. Code, Md.; Poe—Pleading & Practice [Md.] (Tiffany's ed.), Vol. 1, §§ 634, 635.

or equitable therein, under the Gold Hoarding laws, is consistent with the policy of those laws.

Statutes Involved.

The Act of March 9, 1933, c. 1, 48 Stat. 1, provides:

"Sec. 2. Subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. L. 411), as amended, is hereby amended to read as follows:

"(b) During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association, or corporation" (12 U. S. C. § 95a).

Executive Order No. 6260, promulgated August 28, 1933, pursuant to the foregoing statute, provides as follows:

* * * * * * *

"SEC. 5. Holding of gold coin, gold bullion, and gold certificates.—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; * * *.

* * * * * * *

"SEC. 10. Whoever willfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both."

* * * * * * *

Statement.

On August 17, 1936, LeRoy Abbott (respondent) rented a safe-deposit box in the vault of Takoma Park Bank, Inc. (petitioner)[17] (R. 19, 99, 101). The two keys to the box were delivered to him; and he was thereupon given access to his box[18] (R. 19, 99). On that date, he assertedly put a

[17] The vault and safe-deposit boxes therein were shut off from the lobby of the bank by a grille, and admission to them was given by the attendant in charge releasing a lock on a door in the grille (R. 18-19, 31, 32, 99). For opening the deposit boxes, the bank had a guard key, which was required to be inserted and turned to prepare the lock. After its removal, the renter's key was inserted and turned to open the deposit-box door (R. 30, 31, 32, 33, 101).

[18] It is nowhere asserted or claimed that the bank, or its officers or employees, ever knew (or could know) what was placed therein.

sealed envelope containing fifty $1,000 Gold Certificates into the deposit box (R. 19, 99).

On November 30, 1937, respondent requested access to his box (R. 19-20, 29, 100). After his admission to the vault, the attendant used the guard key, and then, by use of respondent's key, the deposit box door was opened (R. 29, 30, 100, 101). The container was removed from the box; and when last seen respondent had left the vault and was proceeding toward the coupon booths (R. 30-32, 101-102). He was not accompanied by the attendant, who returned to her work (R. 30-32, 102). On that date, respondent examined the container, and the sealed envelope with its supposed contents were intact (R. 20, 100). The deposit-box door was locked shut by him before he left the bank (R. 21, 100). The attendant was not present (R. 30-31).

On December 14, 1937, respondent again requested access to the box (R. 21, 32, 100). The attendant used the guard key, and the box was opened with respondent's key. When the door was opened (with both respondent and the attendant present), the inner container and contents were gone [19] (R. 32-34, 100).

Respondent refused to disclose the contents of his box until he had conferred by telephone with his lawyer (R. 21, 41-42, 100-101). After doing so, he asserted that the deposit box had contained:

> Fifty $1,000 Gold Certificates
> Five $100 bills (not gold)
> Diamond ear ring
> Finger ring
> Some insurance papers
> Couple of old income-tax reports

[19] At the trial, upon no more than this testimony, and under a decision by the Court of Appeals of Maryland in the case of *Security Storage Co.* v. *Martin*, 144 Md. 536, 125 Atl. 449, the burden was thereupon cast upon the bank to explain the *prima facie* evidence of its negligence, thus created, in not exercising ordinary or reasonable care and diligence in the safekeeping of the contents of the box (Cf. Opinion, R. 102).

Upon the bank's denial of liability (R. 43), respondent filed this action in a Maryland State court to recover for the alleged loss of the Gold Certificates and the five $100 bills.[20]

To the declaration (as enlarged and limited by plaintiff's bill of particulars), defendant (petitioner) pleaded the General Issue. A second plea expressly denied the right of Abbott to recover for the alleged loss of the Gold Certificates upon the ground that plaintiff had no interest, legal or equitable, therein, because he held them in violation of the Gold Hoarding Act[21] and the President's Executive Order No. 6260 (12 U. S. C. § 95, note) promulgated thereunder, wherefore he could not maintain his action to recover damages, interest and profits for the alleged loss thereof (R. 8-10).

Respondent joined issue upon the first plea (R. 13, 14). He demurred generally to the second plea upon the ground "That said plea is bad in substance and insufficient in law" (R. 14). The demurrer was sustained, and the trial proceeded (R. 13).

On cross-examination,[22] respondent testified that he re-

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[20] No demand was made for the other effects claimed to have been in the box.

[21] Oct of October 6, 1917, § 5(b), as amended by Act of March 9, 1933, § 2, 48 Stat. 1, 12 U. S. C. § 95a.

[22] It will be observed that on direct examination respondent disclosed no circumstances corroborative of his claim to have owned this very substantial sum of money in Gold Certificates of large denomination. To demonstrate the improbability of respondent's claim that he had possessed such a sum of money, petitioner sought by cross-examination to develop the family and financial background of the aunt whom he claimed had handed him an envelope containing fifty $1,000 Gold Certificates, and that of another aunt, who, assertedly, had given it to her; the improbability that these ladies ever could have had such funds; and that in any event others than respondent were the natural objects of their affection and bounty (R. 23-26; compare, R. 67-73). The trial court grossly restricted petitioner's cross-examination of respondent. The rulings of the trial court approached, if they did not constitute, denial of due process of law. *Alford v. United States*, 282 U. S. 687.

ceived a sealed envelope from an aunt in 1925 or 1926, which he kept unopened until July, 1936; that in that month he opened the envelope, and discovered that it contained fifty $1,000 Gold Certificates (R. 23-26).

Upon the testimony of respondent himself, it was established that he was hoarding Gold Certificates from at least August 17, 1936, until November 30, 1937.

Petitioner contested respondent's claims, and offered testimony in denial of any negligence on its part (R. 28-55).

At the close of the evidence, petitioner requested a prayer for direction of the jury as to Gold Certificates:

"Defendant's 'C' Prayer.

> "The Court instructs the jury that the state of facts alleged in the defendant's second plea appear to have been proven by uncontradicted evidence and, therefore, this Court rules as a matter of law that the plaintiff is not entitled to recover anything on account of the alleged loss of the fifty $1,000. gold certificates" (R. 58).

This prayer was rejected (R. 58, 13).

From a verdict and judgment in favor of respondent for $50,500 (R. 13), petitioner appealed to the Court of Appeals of Maryland (R. 13, 14). That court affirmed the judgment (R. 110, 123), with a written opinion (R. 97).

Specification of Errors to be Urged.

1. The court erred in holding that respondent retained any interest in Gold Certificates, which would support an action or judgment therefor against petitioner.

2. The court erred in holding that it was necessary for petitioner to allege that respondent had no license from the Secretary of the Treasury to possess or own Gold Certificates.

3. The court erred in holding that it was necessary for petitioner to show an intent on the part of respondent to violate the Gold Hoarding Act and Executive Order.

4. The court erred in holding that petitioner could not dispute the title of respondent in Gold Certificates.

5. The court erred in holding that petitioner's second plea to the declaration was insufficient.

6. The court erred in holding that petitioner's "C" prayer was properly rejected.

7. The court erred in entering a judgment permitting respondent to recover for the loss of Gold Certificates.

Reasons for Granting the Writ.

The court below has decided a Federal question of substance not heretofore determined by this Court, and in a way which is probably not in accord with Federal policy as indicated by applicable decisions of this Court. Furthermore, a clear conflict exists between the decision below and that of the highest court of the State of Kansas in *Schmidt* v. *Twin City State Bank*, 151 Kans. 667, 100 P. (2d) 652. The question involved is of public importance.

Executive Order No. 6260 (12 U. S. C. §95, note) promulgated August 28, 1933, pursuant to the Act of October 6, 1917 (as amended by Act of March 9, 1933, c. 1, §2, 48 Stat. 1; 12 U. S. C. §95a), specifically provides that after 30 days from its date—

> "* * * *no person shall hold in his possession or retain any interest, legal or equitable, in any* gold coin, gold bullion, or *gold certificates* situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; * * *." (Italics added.)

This Court has sustained the power of Congress, and of the President acting under its authority, to adopt the policy laid down by the Gold Hoarding Act.[23] Under a statute in *pari materia* (Gold Reserve Act of 1934, c. 6, 48 Stat. 337, §§3, 4; 31 U. S. C., §§441 *et seq.*) forfeitures of gold have been repeatedly effected.[24] Compulsory surrender of gold into the Federal Reserve System and the Treasury of the United States has been upheld.[25] The policy to be applied in this case is thus plainly shown.

In the light of this policy, Gold Certificates are in the nature of contraband, wherefore no damage could be sustained by the loss of them. This view was taken by the Supreme Court of Kansas in *Schmidt* v. *Twin City State Bank*, 151 Kans. 667, 100 P. (2d) 652.[26] In that case Schmidt claimed the loss of gold coins and currency from a safety-

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[23] *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330.

[24] *United States* v. *71.41 Ounces Gold Filled Scrap (Claim of Baraban)*, 94 F. (2d) 17; *United States* v. *98 $20 United States Gold Coins*, 20 Fed. Supp. 354; *United States* v. *64.02 Troy Ounces, etc., Scrap Gold*, 8 Fed. Supp. 841. Compare, *Schmidt* v. *Twin City State Bank*, 151 Kans. 667, 100 P. (2d) 652.

[25] *Uebersee Finanz-Korporation, etc.*, v. *Rosen*, 83 F. (2d) 225; *Campbell* v. *Chase National Bank*, 5 Fed. Supp. 156 (Aff'd. 71 F. (2d) 669, cert. denied 293 U. S. 592.)

[26] That court quoted with approval rulings of the Kansas trial court, as follows:

"(1) That defendant's two motions to strike, being all of the written motions to strike, filed at the close of plaintiff's evidence and directed to plaintiff's evidence as to the alleged loss of the gold coins from his safety-deposit box, be and the same are each respectively hereby sustained for the reason that the title, if any, of the plaintiff and Maude Heath in and to all of said gold coins alleged to have been lost from plaintiff's safety-deposit box was extinguished in them and passed to and vested in the United States of America by virtue of the laws of the United States then in force and effect and for the further reason that under the laws of the United States then in full force and effect, neither the plaintiff or Maude Heath could have lawfully acquired title to any gold coins alleged to have been deposited in said safety-deposit box after the date of August 28, 1933.

"(2) That the defendant's demurrer as to gold coins filed at the close of the plaintiff's evidence be and the same is hereby sustained for the

deposit box which he had rented in the defendant bank. He asserted that the articles had disappeared from the safety-deposit box through the bank's negligence. The case is in direct conflict with the judgment below[27]

The opinion of the court below holding petitioner a bailee, and hence estopped to deny the title of respondent, cannot alter the Federal policy enjoined by the Gold Hoarding Act and Executive Order. *Awotin* v. *Atlas Exchg. Nat. Bank*, 295 U. S. 209, 213. Cf. *Hannay* v. *Eve*, 3 Cr. 242. The State rule of estoppel must yield to the Federal statute. *Anderson* v. *Carkins*, 135 U. S. 483, 485-486.

Whether it was necessary for petitioner to allege and prove that respondent had no license to hold Gold Certificates is likewise a question to be answered by the Federal policy. The Executive Order provides that "no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates * * * except under license therefor issued pursuant to this Executive Order; * * *." One who would bring himself within the exception must, as a matter of Federal policy, make the showing that he is embraced therein. *Nortz* v. *United States*, 294 U. S. 317, 328-329; *Hill* v. *Smith*, 260 U. S. 592, 595; *Martinez* v. *United States* (C. C. A. 5th, 1928),

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reason that the plaintiff has failed to prove any measure of damages or value of the gold coins alleged to have been lost and for the reason that the title, if any, of the plaintiff and Maude Heath in and to all of said gold coins alleged to have been lost from plaintiff's safety-deposit box was extinguished in them and passed to and vested in the United States of America by virtue of the laws of the United States then in force and effect."

[27] The Kansas case accords—and the case below conflicts—with the well-established general rule that one who is suing in respect of property which is in the nature of contraband can have no right, title or interest therein which a court will recognize. *Mullen* v. *Moseley* (1907), 13 Ida. 457, 464, 90 Pac. 986, 12 L. R. A. (N. S.) 394, 121 Am. St. Rep. 277, 13 Ann. Cas. 450; *Board of Police Commrs.* v. *Wagner* (1901), 93 Md. 182, 192-196, 48 Atl. 455; *Spalding* v. *Preston* (1848), 21 Vt. 9; *Mills Novelty Co.* v. *Dunbar* (1906), 11 Ida. 671, 83 Pac. 932; *Kite* v. *People* (1903), 32 Colo. 5, 10, 74 Pac. 886.

25 F. (2d) 302; *Albert* v. *United States* (C. C. A. 6th, 1922), 281 Fed. 511.

It is likewise as to intent. Whether the "willful intent" required by the penal provisions of the Act and Executive Order (§ 10) can be read into the section governing withdrawal of property rights (§ 5) is a question of Federal policy. Cf. *United States* v. *Balint,* 258 U. S. 250, 253; *Harmony* v. *United States,* 2 How. 210, 233-234. If, as petitioner contends, intent is no element under the civil section of the Order, the court below was wrong in holding that petitioner could not avail itself of the defense of gold hoarding because it had not pleaded that inapplicable element. The court below purported to support its decision by the case of *United States* v. *98 $20 United States Gold Coins,* 20 Fed. Supp. 354. That case did not involve the question of intent under the Gold Hearing Act and Executive Order, but arose under the forfeiture section of the Gold Reserve Act of 1934.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 594.

TAKOMA PARK BANK, INC., *Petitioner*,

v.

LEROY ABBOTT.

BRIEF OF RESPONDENT IN REPLY TO PETITION FOR WRIT OF CERTIORARI.

W. C. SULLIVAN,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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GROUNDS ON WHICH JURISDICTION IS INVOKED.

The Court of Appeals of Maryland in disposing of the questions raised on the present petition said (R. 102-4):

> "The defendant filed two pleas, the first plea being the general issue plea. The second plea was a special plea reciting that plaintiff had no interest, legal or equitable in the fifty $1000.00 gold certificates of the United States of America because he held them in violation of Section 5 (b) of the Act of Congress of October 6, 1917 as amended by Section 2 of the Act of Congress of March 9, 1933, and the Executive Order No. 6260, Section 5 dated August 28, 1933, and is not legally entitled to maintain his action to recover damages, interest, and profits for the alleged loss thereof. To this second plea the plaintiff demurred and the demurrer was sustained.

"Was the court correct in sustaining this demurrer? Section 5 of the Executive Order No. 6260 above referred to provides that after thirty days from August 28, 1933, no person shall hold or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive Order. The special plea did not state that the plaintiff did not have a license. 'To constitute a good plea in bar, the matter pleaded, must, if true, afford a full and complete answer to the action and show that there is no right of recovery.' Glenn v. Williams, 60 Md. 93; Carroll v. Bowen, 113 Md. 150 at page 154. Section 3 of the Act of March 9, 1933, supra, also directs that the Secretary of the Treasury shall pay therefor an equivalent amount of any other form of coin or currency issued under the laws of the United States, and although the gold certificates in this case were held after thirty days from August 28, 1933, in order for confiscation to take place, it appears that intent to violate the act must be shown. United States v. 98 $20 United States Gold Coins, et al, No. 342, District Court, E. D. Pennsylvania, August 17, 1937, 20 Fed. Supp. 354. The case of (fol. 120) Schmidt v. Twin City State Bank (April 6, 1940), 151 Kan. 667, 100 P. (2) 653 is cited by the appellant but in that case, at the conclusion of the plaintiff's case, the defendant filed a motion to strike from the record all evidence concerning gold coins. Further, the special plea does not answer the whole declaration because there is no defense set up therein to the loss of $500.00 in currency. Mitchell v. Sellman, 5 Md. 376. Unless the plea expressly states that it is intended only as an answer to a part, it will be taken as extending to the whole, and will necessarily then be held bad on demurrer, unless it presents a good defense to the whole. Poe on Pleading, Tiffany Edition, Sec. 664. We must also note that as above stated, based on the ruling in the case of Security Storage Company v. Martin, supra (144 Md. 536) the relation of bailor and bailee existed and that a bailee cannot dispute the bailor's title. Van Zile, Bailments & Carriers (2nd ed.) 1908 Sec. 20 pp. 17-18. We, therefore, concur with the trial court in sustaining this de-

murrer to the second plea. The demurrer to the second plea having been sustained, the defendant's C. prayer based on the second plea was properly rejected."

It is evident from the foregoing excerpt from the opinion of the Court of Appeals of Maryland that it based its decision so far as the instant petition is concerned upon three federal and three non-federal grounds, any one of which six grounds was sufficient in itself to sustain this judgment, the grounds being:

(a) The defendant did not show that the plaintiff did not have a license under the executive order, (b) the Act of March 9, 1933, directs that the Secretary of the Treasury shall pay for all gold bullion in an equivalent amount in another form of coin or currency, (c) intent to violate the act was not shown, (d) the plea did not afford a full and complete answer to the action and show that there was no right of recovery, (e) no defense was set up as to the $500 in non-gold currency, and (f) a bailee cannot dispute the bailor's title.

It is, of course, elementary that where a State Court acts upon both federal and non-federal grounds either of which is sufficient to sustain its judgment, this Court will not take jurisdiction.

STATEMENT OF FACTS.

LeRoy Abbott, a resident of Washington for thirty-five years and a customer of the Takoma Park Bank from July 6, 1935 (R. 43), rented a safe deposit box from the petitioner on August 17, 1936, and in that box deposited an envelope containing fifty $1,000 gold certificates or gold notes, an ear ring and a diamong ring (R. 20). In addition to the envelope, he placed in the safe deposit box some business papers, ten $100 bills which he received from the Cashier of the petitioner (R. 19). This $1,000 represented the balance of a check of $3,762 remaining after he had deposited $2,762 to his savings account (R. 18-19, 43). Abbott had

sold his business and received on account of the purchase money a check of a Mr. Saylor for $3,762. On the same day he opened a savings account with a deposit of $200 for the purpose of enabling James N. Payne, his employee, to deposit the proceeds of unpaid accounts when and as collected (R. 18).

Abbott stated that the reason he did not deposit the gold certificate was because of trouble he had with his wife and he was afraid she would find out that he had this money. He further stated that he did not know at that time that the bills or gold certificates should be turned in to the Treasury and exchanged (R. 39-40).

He went to the safe deposit door and after ringing the bell and being admitted by the woman attendant, he rented a safe deposit box for three years stating he was leaving Washington and did not know when he would return (R. 19). He signed a contract of rental for the safe deposit box which provided that no one other than the renter should have access to the box (R. 36). After receiving his receipt, the attendant walked around to the safe deposit box door in the vault room and said this is your number and she put the box in the locker and gave the key a turn and then handed to the respondent the key to the box and let him out of the vault (R. 19). Upon his return to Washington he went to the box and took out a note given to him by the purchaser of his business and everything in his box was intact (R. 19). He did not take any money out of the box until May, 1937. He was not able to give the exact amounts and dates but took out $100, or whatever amount he needed at the particular time, and on November 30, 1937, he took out $200 and counted the bills remaining and there was $500 left (R. 19). The envelope containing the fifty $1,000 gold notes, the ear ring and the diamond ring was made out of brown heavy manila paper "and instead of opening up like a regular envelope would it had two little seals you take a piece of cord and run around this way (indicating) to seal it up. Then over top of that was a piece

of sealing wax to seal the cord' (R. 20). He never took any of the fifty $1,000 bills out of the envelope and the envelope was intact and the seal had not been broken when he examined his box on November 30, 1937 (R. 20). After examining his box, the black box was put back in the depositary, and it locked when the respondent took the key out (R. 21). He left the vault when the attendant released the lock on the gate or grill (R. 21). "There is always an attendant in charge of the door" (R. 21).

He further stated that on December 13, 1937, he went to the Morris Plan Bank and saw Mr. Collegeman and asked him if he could dispose of one of the $1,000 gold certificates. He was asked how many of these certificates he had and when he told him he had fifty he was advised to get counsel. Pursuant to that advice, he called Henry F. Woodard, an attorney, that afternoon and was advised to go to the bank on the morning of the 14th to get the box and take it to him and he, Woodard, would take them to the Treasury and explain why they had not been turned in (R. 40).

The respondent next went to the Bank on December 14, 1937. He went to the door, rang the bell and, while he signed the register, the lady took his key and opened the compartment and the box and its contents were gone (R. 21).

The attendant called an officer of the Bank who inquired what was in the box and why the respondent had come so early in the morning. The respondent told the bank officer that "he had seen counsel the night before and that he would like to get in touch with his counsel and see what he says to tell you" (R. 21). Mr. Henry F. Woodard was called by telephone, and he told Abbott to give the Bank a full list of the contents of the box, which he did (R. 21-2).

The respondent, with his counsel Mr. Woodard, went to the Bank the next morning (R. 15, 22) and talked with Mr. Gates, an officer of the Bank, who stated "Well, either Mr. Abbott took the box away, or else it got put in the wrong slot" (R. 17) and a higher official of the Bank told Mr.

Woodard, in the presence of the respondent, that "the Bank was insured and we could sue" (R. 17).

On cross-examination, the respondent testified he got the fifty $1,000 gold certificates from his aunt, Caroline Points, in the fall of the year 1925 or 1926 (R. 24). On re-direct examination the respondent testified that he showed the money to James Payne about two weeks before he finally closed out his business (R. 26), and James Payne testified that in July, 1936, Abbott showed him an envelope with fifty $1,000 gold notes in it, and the bills were counted (R. 26).

Victor Fortwengler, a witness for the respondent, testified that he accompanied Abbott to the Bank on November 30, 1937, and that when Abbott returned to his automobile the witness did not see him have a box or anything with him. They returned to Abbott's apartment and the witness did not see Abbott take any box out of the car (R. 27).

The petitioner produced Hazel Funkhouser, an employee, who testified that she rented the safe deposit box to Abbott on August 17, 1936, had him sign the card and issued to him the keys. She knew Abbott as a customer of the Bank and was familiar with his signature (R. 28-9). She further testified that she got the key number 648 from one of the safe deposit boxes in the vault where the keys are kept that are not in use, and in order to get in the safe deposit box it is necessary to use both a guard key and the key to the box. The guard key was kept by Mrs. Adler who had charge of the safe deposit boxes in her cage back of the grille, and the key to the box where the unused keys are placed was kept in a money drawer in Mrs. Adler's cage and sometimes hangs right beside her and is available to all employees of the bank. She admitted him to the vault on November 30, 1937 (R. 31-2).

Helen Adler admitted the appellee to the vault on December 14, 1937 (R. 32). She testified that on December 14, 1937 "he came in and pressed the buzzer by the side of the door and then I released the lock from my desk and took

the master keys and went to the vault and he was right along with me. I inserted the master key and then took it out and put his key in and turned it all the way back * * * After I opened the lock I looked and the box wasn't there. I run my arm back in the box and I said 'Well, your box isn't there.' He said, 'That is funny' " (R. 32-3).

The guard keys were kept on her desk (R. 41, 42) and another set were kept in her drawer (R. 33-4) and the key to the tray containing unused customers' box keys is likewise kept in her desk (R. 34). All of these keys are "available to all the employees of the Bank" (R. 31).

Harold F. Gates, the Assistant Cashier, testified his first contact with Abbott was on December 14, 1937, when Mrs. Adler brought the respondent to his desk, (R. 41) stating "that when she opened the compartment in which his box—in which his key was—that there was no box in the compartment and he wanted to consult with an officer of the Bank about that" (R. 41).

A demand was made upon the Bank and ignored and suit was brought.

The Pleadings.

The suit was brought in Montgomery County by the filing of a declaration on September 19, 1938, (R. 1) and the particulars of the plaintiff's claim were supplied October 11, 1938 (R. 1) pursuant to a demand made September 30, 1938 (R. 1).

On October 19, 1938, a petition for removal to the District Court of the United States for the District of Maryland was filed, (R. 1) and on November 12, 1938, a stipulation suspending and staying proceedings was filed (R. 1).

The defendant's pleas were filed on December 14, 1938, (R. 1) and the introduction to them reads as follows (R. 8):

"The defendant, The Takoma Park Bank, Inc., a body corporate, sued herein under the designation 'The Takoma Park Bank, a corporation, Inc.,' by William D. Macmillan, Leonard J. Ganse, and William V. Bouic, its Attorneys, for

pleas to the Declaration as enlarged and limited by the plaintiff's Bill of Particulars filed thereto, says:

This introduction was followed by two pleas. The first plea was the general issue (R. 8). The second plea was a special plea setting forth that the "plaintiff had no interest, legal or equitable" in the 50 $1000 gold certificates because he held them in violation of sec. 5 (b) of the Act of Congress of October 6, 1917, as amended by sec. 2 of the Act of March 9, 1933, and the Executive Order No. 6260, sec. 5, and is not legally entitled to maintain his action (R. 8-10). To this second plea the plaintiff demurred and the demurrer was sustained (R. 13).

ARGUMENT.

The State Court of Appeals decided the question raised by the petition upon six grounds, three federal and three non-federal (*supra* p. 3). It is submitted that the federal grounds were correctly decided:

(a) Because the petitioner did not show that the respondent did not have a license under the Executive Order.

(b) Because no intention to violate the act was shown.

(c) Because Congress definitely described and prescribed the result of failure to comply with the statute by turning in the gold certificates. Congress gave no power to the President to pass Executive Orders as to the consequences of violation of the Act but it prescribed such consequences itself in the form of fine and imprisonment. It did not prescribe a forfeiture of property but instead by Section 3 of the Act required that the Secretary of the Treasury pay for all gold turned in to him in an equivalent amount and in some other form of coin or currency. Nor did the Executive Order go beyond the imposition of the statutory penalty.

The petitioner's case is rested by it entirely upon the proposition that respondent had no property right in the gold certificates either legally or equitably which a court

may recognize consistent with the Executive Order No. 6260. However, as pointed out by the Court of Appeals of Maryland in its opinion (R. 103) "Section 3 of the Act of March 9, 1933, *supra*, also directs that the Secretary of the Treasury shall pay therefor an equivalent amount of any other form of coin or currency issued under the laws of the United States."

Neither the statute nor the Executive Order confiscated or attempted to confiscate gold certificates. Any holder of any gold certificate retained his rights in the certificate for sec. 248 of Title 12 of U. S. C. A. par. "N" deals directly with this subject and authorizes the Secretary of the Treasury to call in for delivery "any or all gold coin and gold bullion and gold certificates" and specifically provides that "Upon receipt of such gold coin, gold bullion and gold certificates, the Secretary of the Treasury shall pay therefor an equivalent amount of any other form of coin or bullion mined or issued under the laws of the United States."

It is also submitted that the non-federal grounds were correctly decided:

(a) Because a plea must answer the whole of the declaration. It must be conceded that the plea did not answer the whole of the declaration, because it was silent concerning the $500 in currency.

> "With reference to pleas in bar generally, the rule is that in order to operate as a complete bar to the action they should be a substantial and conclusive answer, and should, moreover, answer the whole of what is alleged in the declaration, and be good in every part, and that when they assume to answer the whole and only answer a part, they will be bad altogether. * * * But when a plea is only intended for part of the declaration it must not cover the whole but must ascertain the part to which it is applied, for, *unless it expressly states that it is intended only as an answer to a part* it will be taken as extending to the whole and will necessarily then be held bad on demurrer, unless it presents a good defense to the whole." (Italics ours)

Poe's Pleading & Practice, Vol. 1, Sec. 664, Tiffany's Ed.

The pleas here were two in number, one of general issue and the other a bad special plea, both preceded by the same introduction. One could not be a plea to the whole and the other to but a part (*supra* p. 8).

(b) No defense was set up at the trial as to the $500 in gold currency.

(c) A bailee cannot dispute the bailor's title.

But whether the non-federal grounds were correctly or incorrectly decided was beside the point. They are sufficient to sustain the judgment of the State Court of Appeals and whether it erred or not in deciding them this Court will not consider.

It is the settled rule that where the judgment of a State Court rests on two grounds, one involving a federal question and the other not, and the ground independent of the federal question is sufficient in itself to sustain the judgment of the State Court, this Court will not take jurisdiction; and this rule applies both in cases of appeals from State Courts (*Honeyman* v. *Hannon*, 300 U. S. 14; *Lynch et al.* v. *People of New York*, 293 U. S. 52) and to petitions for writs of certiorari (*Ward* v. *Love County*, 253 U. S. 17, 22-3; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540-1).

The petition should be denied.

Respectfully submitted,

W. C. Sullivan,
Attorney for Respondent.